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No. 09-289

In The
Supreme Court of the United States

THE STATE OF MISSISSIPPI,
Petitioner,

v.

THE CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether the State of Tennessee is a necessary and indispensable party to a lawsuit filed by the State of Mississippi against the City of Memphis, Tennessee, and its utility division in which Mississippi seeks money damages for the alleged "wrongful taking" of ground water it claims to "own" when (1) the ground water at issue is part of an interstate aquifer underlying multiple states, including Tennessee and Mississippi; (2) the aquifer has never been apportioned either by this Court, congressional act, or interstate compact; and (3) the City of Memphis withdraws water from the aquifer only from within Tennessee's boundaries and in compliance with Tennessee's laws.

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INTRODUCTION

The State of Mississippi has sued the City of Memphis, Tennessee ("Memphis") and its utility division, Memphis Light, Gas & Water Division ("MLGW"),[1] for the alleged wrongful taking of ground water from an interstate aquifer that lies beneath and is shared by Tennessee, Mississippi, and other states. Mississippi claims to "own" the specific quantity of ground water at issue in this case.

Memphis withdraws ground water from the interstate aquifer through wells that are located entirely within Tennessee and operated in compliance with Tennessee law. The ground water in the aquifer has never been apportioned among the states overlying it by interstate compact, equitable apportionment, or act of Congress.

Consistent with the undisputed facts and well-settled law, the district court and the Fifth Circuit concluded that: (1) Mississippi's claims against Memphis and MLGW necessarily assert "ownership" over a portion of the interstate resource that Mississippi shares with Tennessee; (2) equitable apportionment is the doctrine of federal common law that governs adjudication of states' sovereign rights to the use of interstate water resources; (3) the equitable apportionment of an interstate water resource is a matter "between states," and, therefore, Tennessee must be a party to any such action concerning the aquifer at issue; and (4) this Court has original and

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[1] Respondents are sometimes referred to herein collectively as "Memphis."

exclusive jurisdiction to hear disputes between states pursuant to 28 U.S.C. § 1251(a).

The district court correctly held that Mississippi's lawsuit must be dismissed because Tennessee is a necessary and indispensable party pursuant to Rule 19 of the Federal Rules of Civil Procedure. The Fifth Circuit properly upheld the district court's decision, finding no abuse of discretion.

Mississippi's request for review fails on multiple grounds. *First*, the ruling below is entirely consistent with and, in fact, required by this Court's decisions holding that equitable apportionment is the doctrine that governs disputes between states over rights to interstate water resources. *See, e.g.*, *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). It is well settled that equitable apportionment requires the presence of the affected states and that this Court has exclusive jurisdiction over such actions. *Id.*; *see also Texas v. New Mexico*, 462 U.S. 554, 567 (1983); *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 107 (1938). Mississippi's attempt to carve out an exception for interstate ground water finds no support in this Court's equitable apportionment decisions.

Second, Mississippi's claim that the decision below conflicts with this Court's cases involving the equal footing and public trust doctrines is completely unfounded. To the contrary, the doctrine of equitable apportionment is consistent with and in fact stems from the same principle of state sovereignty underlying this Court's equal footing and public trust decisions – that of equality of right among the states. *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907).

Third, there is no conflict in the circuits that warrants certiorari. Mississippi asserts that the decision below conflicts with decisions of the Eighth and Eleventh Circuits involving interstate water rights. Yet those cases involve factually distinct claims against the U.S. Army Corps of Engineers, in which the pertinent legal issue was the Corps' statutory authority to operate dams and reservoirs. Similarly, Mississippi's claim that the Fifth Circuit's decision conflicts with this Court's interpretation of 28 U.S.C. § 1251(a) in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), relies on a deeply flawed understanding of that case.

Finally, the decision below does not raise an important or unsettled question regarding Rule 19 of the Federal Rules of Civil Procedure. The Fifth Circuit made a highly fact-intensive and practical determination that Mississippi's lawsuit necessarily impacts Tennessee's rights to the shared use of the Aquifer and that a judgment rendered in its absence would be acutely prejudicial to Tennessee's interests. The Fifth Circuit affirmed the district court's Rule 19 analysis based on an abuse of discretion standard. Mississippi's Petition fails to present any important federal questions that warrant this Court's review.

OPINIONS BELOW

The district court's dismissal of Mississippi's lawsuit is reported at *Hood, ex rel. Mississippi v. City of Memphis, Tenn.*, 533 F. Supp. 2d 646 (N.D. Miss. 2008). The Fifth Circuit's ruling affirming the district court's decision is reported at *Hood, ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625 (5th Cir. 2009). Both opinions are reproduced in the Appendix

of Mississippi's Petition and will be cited herein as "*Dist. Ct.* (Petition, p. _a)" and "*Fifth Cir.* (Petition, p. _a)."

STATEMENT OF THE CASE

1. Factual Background

This case concerns Mississippi's claim that it "owns" a specific portion of ground water flowing through the Memphis Sand Aquifer, an interstate water resource underlying and shared by several states, including Tennessee and Mississippi (the "Aquifer").

Mississippi does not allege any impairment to its rights to use the Aquifer. Instead, Mississippi asserts common law tort claims – conversion and trespass – against Memphis and its utility division, MLGW, alleging that Respondents have wrongfully withdrawn ground water that is "owned" by Mississippi. Mississippi seeks monetary damages in excess of $1 billion.

For the past 120 years, Memphis has relied on the Aquifer as its primary public water source. It is undisputed that Memphis withdraws ground water from the Aquifer through wells that are located entirely within the borders of Tennessee and that Memphis operates those wells in compliance with Tennessee's laws and regulations.[2] It is further

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[2] *See, e.g.*, TENN. CODE ANN. § 69-7-304(1) (requiring the registration of water withdrawals of more than 10,000 gallons per day with the Tennessee Department of Environment and

undisputed that the Aquifer has never been apportioned by judicial decree, interstate compact, or congressional act. *Fifth Cir.* (Petition, p. 2a) (affirming that "no specific volumes of groundwater from the Aquifer have been apportioned to Mississippi, Tennessee, or Arkansas"); *Dist. Ct.* (Petition, p. 23a) (finding that the Aquifer had "not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court").

2. Rule 15(2) Misstatements of Fact in Mississippi's Petition

Mississippi makes several erroneous factual assertions about the Aquifer and the ground water moving through it. Pursuant to Rule 15(2) of the Supreme Court Rules, Respondents bring those factual misrepresentations to the Court's attention.

First, Mississippi describes the ground water in the Aquifer beneath DeSoto County, Mississippi, as "essentially static" and "naturally entrapped" beneath and within Mississippi's state borders. Petition, pp. 3-4. This description is false and is refuted by the testimony of Mississippi's own retained expert and officials at the Mississippi Department of Environmental Quality ("MDEQ"), all of whom confirm that the ground water in the Aquifer is, and prior to any pumping from the Aquifer was, dynamic, moving,

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Conservation ("TDEC")); TENN. CODE ANN. § 68-221-706(a)(5) ("The source of raw water and the quantity of raw water to be drawn from the waters of the state are subject to review and approval by [TDEC]."); *see also Fifth Cir.* (Petition, p. 14a) (stating that Memphis is utilizing the Aquifer "pursuant to Tennessee law").

and flowing through and out from under Mississippi and never confined there. App. 1, pp. 2b-4b, 6b;[3] App. 2, p. 12b;[4] App. 3, pp. 15b-16b;[5] App. 4, pp. 18b-19b.[6]

According to testimony from Mississippi's own witnesses, ground water in the Aquifer is continually flowing in and out of Mississippi; it does not remain there. App. 1, pp. 2b-4b, 6b; App. 3, pp. 15b-16b. In fact, Mississippi's retained expert concedes that, before any pumping began, ground water naturally moved through the Aquifer from Mississippi into Tennessee. App. 1, pp. 2b-4b, 6b.

Second, Mississippi suggests in its Petition (for the first time in this litigation) that the Aquifer is not a shared interstate resource, but rather two "finite, confined reserve[s] of ground water" – one in Mississippi and one in Tennessee. Petition, p. 4; *see*

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[3] Appendix 1 includes excerpts from the transcript of the deposition of David A. Wiley, Mississippi's retained expert geologist.

[4] Appendix 2 includes excerpts from the transcript of the deposition of Jamie Crawford, one of Mississippi's designees pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Mr. Crawford is the Assistant Director of the MDEQ's Office of Land and Water Resources.

[5] Appendix 3 includes excerpts from the transcript of the deposition of Jim Hoffman, one of Mississippi's designees pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Mr. Hoffman is the Geologist Administrator of the MDEQ's Office of Land and Water Resources.

[6] Appendix 4 includes excerpts from the transcript of the deposition of Charles Branch, Director of the MDEQ's Office of Land and Water Resources from 1979 until 2002.

also id., p. 3 (describing the ground water at issue as "confined within Mississippi's boundaries by the geology of [the Aquifer]"). This novel position is directly refuted by Mississippi's numerous admissions throughout this litigation that the Aquifer is a single interstate water resource, underlying parts of several states, including Tennessee. *See, e.g.*, Amended Complaint, ¶ 14, Doc. 112 (Oct. 5, 2006) (asserting that the Aquifer "is an underground reservoir that underlies portions of West Tennessee and Northwest Mississippi"); *Dist. Ct.* (Petition, p. 23a) (noting that "it is admitted by all parties and revealed in exhibits that the Memphis Sands or Sparta aquifer lies under several States including the States of Tennessee and Mississippi").

Mississippi's new contention is also at odds with its own assertions concerning jurisdiction and the application of federal common law to this case, both of which rely on the fact that the Aquifer is an interstate water resource shared by Tennessee and Mississippi. *See, e.g.*, Petition, p. 21 n.9 (relying on the "interstate nature of the sand formation comprising the aquifer" as the basis for federal question jurisdiction and the "transboundary character of the aquifer" as grounds for the application of federal common law); Amended Complaint, ¶¶ 8, 46, Doc. 112 (Oct. 5, 2006) (characterizing its lawsuit as an "interstate or transboundary ground water dispute"); *Dist. Ct.* (Petition, pp. 25a-26a) (noting Mississippi's conflicting and irreconcilable positions and holding that Mississippi "cannot have it both ways").

Third, Mississippi claims that Respondents engaged in an "aggressive extraction of ground water" and thereby "largely drained the aquifer under

Memphis." Petition, pp. 4-5. The prejudicial impact of this gross misrepresentation is compounded by Mississippi's equally false insinuation that unlike surface water, ground water cannot be replenished. Petition, p. 3. Both of these statements are directly contradicted by Mississippi's own allegations in this lawsuit, which make no claim that ground water is scarce or that Mississippi's use of the Aquifer has been impaired by pumping in the Memphis area. Additionally, Mississippi's own Rule 30(b)(6) and expert witnesses directly refuted these statements when they testified that the Aquifer is constantly being replenished. In fact, Mississippi's own expert agreed that, as a result of the Aquifer's continual recharge and discharge, any change in the availability of ground water in Mississippi since pumping began more than one hundred years ago is statistically insignificant. App. 1, pp. 3b, 5b.

3. Procedural History

Mississippi filed this lawsuit on February 1, 2005. In its original complaint, Mississippi asserted various causes of action, including unjust enrichment, trespass, conversion, nuisance, and unlawful taking or inverse condemnation. *See generally* Complaint, ¶¶ 23-39, 45-52, Doc. 2 (Feb. 1, 2006). Mississippi sought relief in the form of monetary damages for alleged past and future injuries, declaratory judgment, constructive or resulting trust, and an injunction requiring Memphis to abandon its exclusive reliance on ground water as a public water source and convert to a surface water system using the Mississippi River. *See generally id.*, ¶¶ 40-44, 53-60.

Among other allegations in its original complaint, Mississippi asserted that Memphis and MLGW had "damaged and diminished the Aquifer, and [Mississippi's] rights and interests therein," by "lowering of the Aquifer groundwater table or artesian pressure," "injuring the Aquifer's ability to recharge, or replenish itself naturally," "causing fear of current and future injury and damage and uncertainty regarding the quality and availability of sufficient quantities of water supplies," and "[causing] financially devastating damage to, destruction of or detrimental impact upon residential and commercial development of Northwest Mississippi." *Id.*, ¶ 19.

On October 5, 2006, Mississippi filed an amended complaint in which it eliminated all the above-quoted allegations and withdrew its claims that pumping in the Memphis area had damaged the Aquifer and Mississippi's use of the Aquifer. *See generally* Amended Complaint, Doc. 112 (Oct. 5, 2006). Mississippi's amended complaint was based solely on Mississippi's alleged "ownership" of a specific quantity of ground water in the interstate Aquifer. *See generally id.*, ¶ 10. Mississippi ultimately abandoned all of its causes of action except for conversion, trespass, and unjust enrichment, and only sought past money damages for what it contended to be the ground water unlawfully taken by Memphis and MLGW from 1965 to 2007. *See, e.g.*, Pretrial Order, Doc. 293, p. 4 (Jan. 23, 2008); Memorandum of Authorities, Doc. 317, p. 1 (Feb. 1, 2008); App. 5, pp. 20b-21b.[7] Respondents

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[7] Appendix 5 is an excerpt from the oral argument held in the district court on February 4, 2008 (Mississippi counsel's argument).

filed two dispositive motions seeking to dismiss Mississippi's claims, one after the filing of the original complaint and another after the filing of Mississippi's amended complaint. *See* Motion to Dismiss, Doc. 21 (Mar. 10, 2005); Motion for Judgment on the Pleadings, Doc. 186 (June 12, 2007). Both motions asserted, *inter alia*, that dismissal was required because Tennessee was an indispensable party under Rule 19 of the Federal Rules of Civil Procedure, and its joinder would trigger this Court's original and exclusive jurisdiction pursuant to 28 U.S.C. § 1251(a). The district court denied both motions. *See* Order Denying Motion to Dismiss, Doc. 47 (Aug. 9, 2005); Order Denying Motion for Judgment on the Pleadings, Doc. 263 (Sept. 25, 2007).

However, on January 28, 2008, the district court entered an order *sua sponte*, giving notice that, "[a]fter carefully reading the parties' pretrial submissions and briefs," it was revisiting the matter of "whether the States of Tennessee and Arkansas are indispensable parties to this action pursuant to Rule 19 of the Federal Rules of Civil Procedure." Order, Doc. 313 (Jan. 28, 2008). On February 4, 2008, after the matter had been briefed and argued by the parties, the district court dismissed Mississippi's lawsuit pursuant to Rule 19. *Dist. Ct.* (Petition, pp. 19a-29a). The court held that Tennessee was a necessary and indispensable party to the action and that, because the joinder of Tennessee was not possible without the court's losing subject matter jurisdiction, equity and good conscience required that this action be dismissed without prejudice. *Dist. Ct.* (Petition, p. 28a).

Mississippi appealed to the Fifth Circuit, which affirmed the district court's ruling in all respects. The

Fifth Circuit found "no abuse of discretion in the district court's determination that Tennessee is an indispensable party and that in equity and good conscience the suit should be dismissed." *Fifth Cir.* (Petition, p. 15a). On September 2, 2009, Mississippi filed its Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Fifth Circuit's ruling that Tennessee is a necessary and indispensable party is not in conflict with the decisions of any other circuit. Sup. Ct. R. 10(a). Further, the decisions below are entirely consistent with and, in fact, required by this Court's long-standing interstate water rights precedent. The rulings of the Fifth Circuit and the district court were based on established law regarding Rule 19 of the Federal Rules of Civil Procedure and firmly grounded in more than a century of this Court's equitable apportionment jurisprudence. Therefore, there is no important federal question that remains unsettled. Sup. Ct. R. 10(c).

Relying on this Court's precedent, the Fifth Circuit correctly upheld the district court's dismissal of Mississippi's action because Tennessee is a necessary and indispensable party under Rule 19, and Tennessee's joinder would trigger this Court's original and exclusive jurisdiction.

> The Aquifer is an interstate water source, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share. Allocation of an

> interstate water source is accomplished through a compact approved by Congress or an equitable apportionment.
>
> . . . Determining Mississippi and Tennessee's relative rights to the Aquifer brings this case squarely within the original development and application of the equitable apportionment doctrine.

Fifth Cir. (Petition, pp. 8a-9a) (citations omitted). The determination of rights to an interstate water resource can be adjudicated only "between states" and through an equitable apportionment action. Tennessee is unquestionably a necessary and indispensable party to any such adjudication pursuant to Rule 19 because Tennessee's sovereign rights to the use of the Aquifer are clearly and adversely implicated by Mississippi's assertion of "ownership" of the unapportioned ground water. This Court would have original and exclusive jurisdiction over the adjudication of that matter pursuant to 28 U.S.C. § 1251(a). As such, dismissal was required.

The applicable law is settled and without conflict. There are no compelling reasons to grant Mississippi's Petition.

I. The Decision Below Is Consistent With This Court's Well Settled Equitable Apportionment Decisions.

A. Under this Court's equitable apportionment decisions, Tennessee is a necessary and indispensable party.[8]

Mississippi concedes the application of "federal common law because of the transboundary character of the aquifer." Petition, p. 21 n.9. For over a century, this Court has held that "[e]quitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Colorado*, 459 U.S. at 183. This Court's "apportionment by judicial decree of the water of an interstate stream" can take place only with the states as parties – it is a matter "between states." *Hinderlider*, 304 U.S. at 107; *see Fifth Cir.* (Petition, p. 11a) ("The Aquifer must be allocated like other interstate water resources in

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[8] The fact that Mississippi improperly lays claim to interstate waters that have not been apportioned does not mean that Mississippi has sufficient grounds to state a viable claim for equitable apportionment or that there is merit to Mississippi's contemporaneously filed Motion for Leave to File a Bill of Complaint in an Original Action (Original No. 139). The decisions of the district court and the Fifth Circuit were correct, irrespective of this Court's decision on Mississippi's Motion for Leave. *See Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1311 (N.D. Ala. 2005) (finding that the district court must dismiss any action "whenever it involves 'a controversy between two or more states,' regardless of whether the case appears to be one over which the Supreme Court will, in its discretion, exercise jurisdiction").

which different states have competing sovereign interests, and whose allotment is subject to interstate compact or equitable allocation."); *see also Arizona v. California*, 373 U.S. 546 (1963), *abrogated on other grounds by California v. U.S.*, 438 U.S. 645 (1978); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Washington v. Oregon*, 297 U.S. 517 (1936); *New Jersey v. New York*, 283 U.S. 336 (1931); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *Kansas v. Colorado*, 206 U.S. 46 (1907).

Mississippi's lawsuit is, on its face, a dispute over rights to use an interstate water resource underlying and shared by Mississippi and Tennessee. Tennessee's rights are, by definition, implicated by Mississippi's unilateral claim of "ownership" of water in the Aquifer that has never been apportioned. The courts below correctly held that the doctrine of equitable apportionment is the only means to adjudicate such a dispute, and only this Court has jurisdiction to hear it. *See Colorado*, 459 U.S. at 183; 28 U.S.C. § 1251(a).

Mississippi's decision to sue only non-state defendants and frame its claims in tort cannot change the fact that Mississippi's allegations necessarily presume that the interstate Aquifer has already been apportioned. That presumption is undeniably wrong. And if the Aquifer is to be apportioned, Tennessee must be a party to that proceeding. *See* App. 6, p. 23b.[9] As the district court recognized:

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[9] Appendix 6 includes excerpts from Tennessee's Amicus Curiae Brief filed with the Fifth Circuit in support of Respondents.

> The subject aquifer in the case *sub judice* has not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court. However, absent apportionment, this court cannot afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer's water is the property of which State. It is simply not possible for this court to grant the relief the Plaintiff seeks without engaging in a *de facto* apportionment of the subject aquifer; such relief, however, is in the original and exclusive jurisdiction of the United States Supreme Court because such a dispute is necessarily between the State of Mississippi and the State of Tennessee.

Dist. Ct. (Petition, pp. 23a-24a).

Mississippi has brought the wrong claims against the wrong parties in the wrong court. Consistent with this Court's equitable apportionment decisions, the courts below rejected Mississippi's attempt to avoid joining Tennessee to this action and triggering this Court's original and exclusive jurisdiction. *See Hinderlider*, 304 U.S. at 107 (finding that the apportionment of interstate waters was a controversy "of immediate and deep concern to both states and that the interests of each were indissolubly linked with those of her appropriators") (quoting *Wyoming v. Colorado*, 259 U.S. 419, 468 (1922)); *Texas*, 462 U.S. at 567 ("There is no doubt that this Court's jurisdiction to resolve controversies between two states extends to a properly framed suit to apportion the waters of an interstate stream between States through which it

flows.") (citations omitted); *Arizona*, 373 U.S. at 564 (recognizing this Court's "serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States"). This law is settled and without conflict. Certiorari is not warranted.

B. Mississippi's claim to "own" a specific quantity of ground water in the Aquifer based solely on its state boundary has been consistently rejected by this Court.

Mississippi's contention that it "owns the surface water and ground water resources within the geographical confines of its boundaries as a function of statehood," Petition, p. 12, ignores the obvious interstate nature of the Aquifer and of this dispute.[10] Mississippi's position is directly contrary to this Court's repeated equitable apportionment pronouncements finding that a state's boundaries are

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[10] Mississippi's claim of ownership based solely on its political boundaries, like its erroneous contention that a hydrogeological barrier exists directly beneath the Mississippi-Tennessee state boundary, is part of Mississippi's flawed effort to change the true physical nature of the Aquifer from what it is (an interstate water resource underlying and shared by both Tennessee and Mississippi), into something it most assuredly is not (an intrastate resource lying only within Mississippi's borders). Throughout this lawsuit, Mississippi and its experts have unequivocally admitted that Aquifer is a shared interstate resource. Mississippi has affirmatively relied on the "interstate nature" of the Aquifer as the basis for its assertion of jurisdiction in the district court and the application of federal common law to its claims. Petition, p. 21 n.9; *see also* Sup. Ct. R. 15(2).

"essentially irrelevant" to the determination of its rights to use an interstate water resource:

> "The contention of Colorado that she as a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained. The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other."
>
> . . . "Both States have real and substantial interests in the River that must be reconciled as best they may."

Hinderlider, 304 U.S. at 102-03 (quoting *Wyoming*, 259 U.S. at 466, and *New Jersey*, 283 U.S. at 342-43); *see also Colorado v. New Mexico*, 467 U.S. 310, 323 (1984) (rejecting "the notion that the mere fact that the [river] originates in Colorado automatically entitles Colorado to a share" and finding that the water's source "should be essentially irrelevant to the adjudication of these sovereigns' competing claims"); *cf. Idaho v. Oregon*, 462 U.S. 1017, 1028 n.12 (1983) (noting that, "[w]hile the origin of the fish may be a factor in the fashioning of an equitable decree, it cannot by itself establish the need for a decree").

The Fifth Circuit rejected Mississippi's position that its state border serves as the sole basis for allocating ground water in the Aquifer – the same failed position advanced by other states in previous equitable apportionment suits:

> The Supreme Court has consistently rejected the argument advanced by different states, and advanced by Mississippi in this lawsuit, that state boundaries determine the amount of water to which each state is entitled from an interstate water source.

Fifth Cir. (Petition, p. 10a) (citing *Hinderlider*, 304 U.S. at 102); *see also Hinderlider*, 304 U.S. at 102-03 (rejecting an upstream state's claim that it has "such ownership or control" to divert all the water in an interstate resource as having been "consistently denied" and "adjudged untenable").

Implicit in the decisions below is the recognition that, in the context of this lawsuit, the "[Aquifer] throughout its course in both states is but a single [resource], wherein each state has an interest which should be respected by the other." *Hinderlider*, 304 U.S. at 102. There is no conflicting authority.

C. Mississippi's attempt to create an exception to the doctrine of equitable apportionment for underground interstate water resources is illogical and contrary to this Court's decisions.

In a transparent attempt to avoid the application of equitable apportionment (and, therefore, the required joinder of Tennessee as a party), Mississippi argues that there is a legally significant distinction between water flowing interstate above the ground and water flowing interstate below the ground. In other words, Mississippi contends that equitable apportionment should not apply to ground water. Citing no authority,

Mississippi bases its contention on a legally unsupported reference to the "residence time of water within a particular geographic area." Petition, p. 18. The Fifth Circuit properly found Mississippi's argument unpersuasive:

> The fact that this particular water source is located underground, as opposed to resting above ground as a lake, is of no analytical significance. The Aquifer flows, if slowly, under several states, and is indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water.

Fifth Cir. (Petition, p. 9a).

In fact, this Court has already equitably apportioned interstate water systems that include hydrologically connected underground water components. *See, e.g.*, *Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995); *Washington*, 297 U.S. at 524-26; *see also Fifth Cir.* (Petition, pp. 9a-10a & n.5) (citing *Texas*, 462 U.S. at 556-57 & nn.1-2, and *Wisconsin v. Illinois*, 449 U.S. 48, 50 (1980), and finding persuasive this Court's equitable apportionment decisions in which "aquifers were not treated differently from any other part of the interstate water supply subject to litigation"); DAN A. TARLOCK, LAW OF WATER RIGHTS & RESOURCES § 10:6 (2009) (noting this Court's holdings that "groundwater pumping can interfere with surface allocations made in an interstate compact" and finding it "likely" that equitable apportionment would be applied to "all water resources, including interstate aquifers"). This Court's precedents thus lend no

support to Mississippi's asserted distinction between surface water and ground water.

Further, Mississippi's position urging an extremely narrow application of equitable apportionment (*i.e.*, only to surface waters with a sufficient "residence time") cannot be reconciled with *Idaho v. Oregon*, 462 U.S. 1017 (1983). In that case, this Court expanded the application of the doctrine beyond interstate water resources to include disputes over interstate wildlife resources. This Court held that, while equitable apportionment "had its roots in water rights litigation" the "natural resource of anadromous fish is sufficiently similar to make equitable apportionment an appropriate mechanism for resolving allocative disputes." *Id.* at 1024 (citing *Kansas*, 206 U.S. at 98). If disputes over anadromous fish fall with the equitable apportionment doctrine – and thus implicate the sovereign rights of bordering states – then disputes over ground water surely also fall within its scope. *See* 4 WATERS & WATER RIGHTS § 45.01, pp. 45-3 – 45-5 (Robert E. Beck ed., 1991 ed., 2004 repl. vol.) (reasoning that this Court "would likely extend the equitable apportionment doctrine to interstate groundwaters" after having already "taken the bolder step of extending the doctrine from interstate streams to anadromous fish runs").

The Fifth Circuit's conclusion that there is no meaningful distinction between surface water and ground water for purposes of applying equitable apportionment is entirely consistent with this Court's prior decisions. Mississippi's contrary position – that interstate waters flowing beneath the ground are "not sufficiently similar" to interstate waters flowing above

the ground – is illogical, unwarranted, and contrary to this Court's precedent.

II. The Decision Below Does Not Conflict With This Court's Decisions Regarding State Sovereignty.

Mississippi erroneously contends that the rulings of the Fifth Circuit and the district court conflict with principles of state sovereignty because, by virtue of the equal footing and public trust doctrines, the ground water at issue is not part of a natural resource shared with another state.[11] Petition, p. 9. This contention is

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[11] The equal footing and public trust cases cited by Mississippi are all *intra*state title suits concerning submerged land. None addresses disputes between states over rights to shared interstate water resources. *See, e.g.*, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472 (1988) (quoting *Cinque Bambini P'ship v. State*, 491 So. 2d 508, 510 (Miss. 1986) (explaining "this in the end is a title suit")); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (title dispute over submerged land beneath Lake Coeur d'Alene, a lake located entirely within Idaho); *Montana v. United States*, 450 U.S. 544 (1981) (title dispute over a portion of the bed of the Big Horn River located entirely in Montana); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (title dispute over a portion of the Willamette River bed located entirely within Oregon); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (title dispute over submerged lands located beneath Lake Michigan on Chicago's lakefront); *Pollard v. Hagan*, 44 U.S. 212 (1845) (title dispute over land entirely within Alabama that lay beneath Mobile Bay during high tide); *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842) (title dispute involving oyster beds on submerged lands under Raritan Bay located entirely within New Jersey). *Howard v. Ingersoll*, 54 U.S. 381 (1851), was a dispute involving private parties, the outcome of which required the determination of the state boundary line

indisputably incorrect – factually, scientifically, and legally.

At the core of this Court's interstate water dispute decisions is the "cardinal rule, underlying all the relations of the states to each other" – "that of equality of right." *Kansas*, 206 U.S. at 97.

> Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever . . . the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

Id. at 97-98; *see also Connecticut*, 282 U.S. at 670 (stating that equitable apportionment disputes are to "be settled on the basis of equality of right" and that "principles of right and equity shall be applied having regard to the 'equal level or plane on which all the States stand'") (quoting *Wyoming*, 259 U.S. at 465).

By claiming "ownership" of a specific portion of water in the interstate Aquifer, Mississippi has overtly "reach[ed], through the agency of natural laws, into

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between Alabama and Georgia along the Chattahoochee River. *Howard* has no application to this case whatsoever.

the territory of another state." *Kansas*, 206 U.S. at 97. Mississippi's claim, by definition, infringes on the sovereignty of Tennessee because it presumes that Mississippi's rights to the unapportioned ground water are superior to Tennessee's rights to the shared interstate resource. That is not the law. No state's self-proclaimed right to an interstate resource can trump another state's competing right, as Mississippi has tried to do in this litigation.

The decisions of the Fifth Circuit and the district court do not conflict with or abrogate state sovereignty, as Mississippi suggests. The opposite is true. Precisely because Tennessee and Mississippi are each sovereign states, on equal footing with one another, the present case is one that fits comfortably within the framework of this Court's equitable apportionment jurisprudence. This interstate water dispute necessarily implicates the sovereign interests of states on equal footing with each other, and thus Tennessee is a necessary and indispensable party pursuant to Rule 19 of the Federal Rules of Civil Procedure. Pursuant to 28 U.S.C. § 1251(a), this Court would have original and exclusive jurisdiction over a properly framed action for equitable apportionment of the Aquifer. This law is settled, and there are no questions of federal law here that have not already been long since put to rest.

III. The Decision Below Does Not Conflict With Courts' Interpretations of 28 U.S.C. § 1251(a).

A. There is no conflict with *Illinois v. Milwaukee*.

The Fifth Circuit and the district court both correctly found Mississippi's reliance on *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee*"), to be unfounded. *Milwaukee* is a water pollution, not a water allocation, case in which Illinois sought to trigger this Court's jurisdiction under 28 U.S.C. § 1251(a) by forcing Wisconsin into its suit against the City of Milwaukee under the legal theory that the state was vicariously responsible for the polluting activities of its political subdivision. *Milwaukee*, 406 U.S. at 94.

In this case, the Fifth Circuit recognized a "crucial factual difference" between the claims in *Milwaukee* and those asserted by Mississippi here.[12] *Fifth Cir.*

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[12] The *Milwaukee* Court recognized a distinction between water pollution cases (such as the one before it) and cases concerning the "problem of apportioning the waters of an interstate stream" (such as this one). *Milwaukee*, 406 U.S. at 105. The *Milwaukee* Court noted that "[e]quitable apportionment of the waters of an interstate stream has often been made under the head of our original jurisdiction." *Id.* at 106 (citing *Kansas v. Colorado*, 206 U.S. 46 (1907), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Arizona v. California*, 373 U.S. 546 (1963)). The federal common law of public nuisance – which controlled the outcome in *Milwaukee* – was preempted by federal statute. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (concluding that "Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate

(Petition, p. 13a). In *Milwaukee*, Wisconsin's sovereign rights and interests in a particular quantity of the water in Lake Michigan were not at issue. Here, however, "Mississippi claims sole ownership of a portion of the interstate water at issue. Mississippi's suit necessarily asserts control over a portion of the interstate resource Memphis currently utilizes pursuant to Tennessee law." *Fifth Cir.* (Petition, pp. 13a-14a). Further, Tennessee has explicitly asserted its sovereign interest in the shared use of the unapportioned Aquifer. *See* App. 6, pp. 22b-23b.

Mississippi's contention that the Fifth Circuit's decision conflicts with *Milwaukee* ignores the fundamentally different nature of the claims at issue. Mississippi misreads *Milwaukee* to mean that a state can never be a necessary and indispensable party to a lawsuit in which it was not named as a party. *See* Petition, p. 24 (contending that Tennessee's interests are not implicated simply because "Mississippi seeks damages against Memphis and MLGW only and has made no claim against Tennessee"). Mississippi's interpretation is flatly contrary to *Milwaukee* itself and at odds with purpose of Rule 19, which exists to avoid the very injustice that Mississippi attempts to perpetrate – that is, bringing a claim in the absence of all parties who have a right to be heard. In this case, the Fifth Circuit correctly held that "Tennessee's water rights are clearly implicated, even if Mississippi has sued only Memphis." *Fifth Cir.* (Petition, p. 14a). *See, e.g., New Jersey v. New York*, 345 U.S. 369, 373 (1953); *see also New Jersey*, 283 U.S. at 342-43 (explaining

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nuisance concepts . . . but rather has occupied the field through the establishment of [the Federal Water Pollution Control Act]").

that a river "must be rationed among those who have power over it" and that both New Jersey and New York "have real and substantial interests in the [Delaware] River that must be reconciled as best they may"); *Wyoming*, 259 U.S. at 466 ("The river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other."). *Milwaukee* is not to the contrary.

B. There is no conflict with rulings from the Eighth and Eleventh Circuits involving the U.S. Army Corps of Engineers.

Mississippi erroneously relies on *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117 (11th Cir. 2005), *Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242 (11th Cir. 2002), and *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), *cert. denied*, 541 U.S. 987 (2004) (collectively "the Corps lawsuits"), to support its position that Tennessee can be joined as a party defendant without invoking this Court's original and exclusive jurisdiction.

The Corps lawsuits all have in common a critical factor that is absent here – the presence of the U.S. Army Corps of Engineers (the "Corps"). In each case, the Corps acts as a federally authorized entity charged with controlling the flow of water to the affected states via dams and reservoirs owned and operated by the Corps pursuant to federal statute. None of the Corps lawsuits involved the application of federal common law, which Mississippi alleges should apply in this case. Rather, the central legal issue in the Corps lawsuits was the scope of the Corps' statutory

authority to operate its dams and reservoirs. *See Georgia,* 302 F.3d at 1256 n.11; *Alabama*, 424 F.3d at 1130 (adjudicating the Corps' authority and obligations vis-à-vis its operation of Buford Dam / Lake Lanier under, *inter alia*, the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (2003), and the Water Supply Act of 1958, 43 U.S.C. § 390b (2003)); *South Dakota*, 330 F.3d at 1025 (adjudicating the Corps' authority to manage the Missouri River pursuant to the Flood Control Act of 1944, Pub. L. No. 78-532, 58 Stat. 887 (1944)).

Because the states' claims in each of the Corps lawsuits were against the Corps, and not against each other, both the Eighth and Eleventh Circuits held that this Court's original and exclusive jurisdiction was not triggered. *See Alabama*, 424 F.3d at 1130 (rejecting Georgia's contention that this Court's had original and exclusive jurisdiction over the dispute and finding that "Alabama and Florida are not attempting to litigate their right to a certain amount of the water in the ACF Basin" and were instead "seek[ing] to ensure the Corps' compliance with federal law"); *Georgia*, 302 F.3d at 1256 n.11; *South Dakota*, 330 F.3d at 1025.

There is no conflict between the decision below and the Corps lawsuits because the Corps is not involved in the case at bar. Neither the Corps nor any other federal agency manages the Aquifer or dispenses the Aquifer's waters to its various users in different states. The interpretation of a federal statute is not at issue. The Fifth Circuit recognized that "Mississippi's suit necessarily asserts control over a portion of the interstate resource Memphis currently utilizes pursuant to Tennessee law," and, therefore, correctly distinguished the Corps lawsuits as being suits by

states "against the [Corps], not against other states, and therefore plainly not within the scope of 28 U.S.C. § 1251(a)." *Fifth Cir.* (Petition, pp. 12a-14a).

IV. The Decision Below Does Not Raise an Important or Unsettled Question Regarding Rule 19.

The district court's dismissal of Mississippi's lawsuit pursuant to Rule 19 and the Fifth Circuit's affirming of that decision do not raise important or unsettled legal questions. Determining whether to dismiss an action for failure to join a necessary and indispensable party involves a two-step inquiry. First, under Rule 19(a)(1), the court must ascertain whether the non-party should be joined to the litigation. That requires an analysis of whether the non-party "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1). If a necessary party cannot be joined without destroying the district court's subject matter jurisdiction, the district court must further assess whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

The district court found that Tennessee was a "necessary party" under Rule 19(a)(1) "because in its absence complete relief cannot be accorded among those already parties to the action." *Dist. Ct.* (Petition, p. 25a):

> [T]o afford the State of Mississippi the relief sought and to hold that the Defendants have

> misappropriated Mississippi's water from the Memphis Sands aquifer, the court must *necessarily determine which portion of the aquifer's water belongs to Mississippi, which portion belongs to Tennessee*, and so on, thereby *effectively apportioning the aquifer*.

Dist. Ct. (Petition, p. 25a) (emphasis added).

The district court found that the factors of Rule 19(b) had been met because a judgment against Memphis and MLGW "would determine the rights of the State of Tennessee and its citizens to the valuable water resources in the subject aquifer, without Tennessee having been a party to this action." *Dist. Ct.* (Petition, p. 27a) Further, the court found no "means by which . . . the prejudice to Tennessee can be lessened or avoided" and noted that any relief afforded "to the Plaintiff of necessity requires apportionment of the subject aquifer, thereby causing great prejudice to Tennessee." *Dist. Ct.* (Petition, p. 27a). Finally, the district court held that "a judgment rendered in Tennessee's absence will not be adequate" and that Mississippi would "certainly have an adequate remedy if this action is dismissed for nonjoinder." *Dist. Ct.* (Petition, p. 27a).

The Fifth Circuit noted that "[d]etermining whether an entity is an indispensable party is a highly practical, fact-based endeavor," and, therefore, the district court's determination is reviewable only for abuse of discretion. *Fifth Cir.* (Petition, p. 5a). The Fifth Circuit found that "[c]learly a judgment rendered in Tennessee's absence would be enormously prejudicial to Tennessee's sovereign interest in its water rights." *Fifth Cir.* (Petition, p. 15a). Finding no

abuse of discretion, the Fifth Circuit held that the dismissal of Mississippi's lawsuit pursuant to Rule 19 was entirely consistent with this Court's interstate water rights cases. *Fifth Cir.* (Petition, p. 15a) ("The specter of a determination of Tennessee's water rights without its participation in the suit is itself sufficiently prejudicial to render the state an indispensable party.") (citing *Hinderlider*, 304 U.S. at 106-07, and *New Jersey*, 283 U.S. at 346). The decision below thus reflects a straightforward analysis of Rule 19, which follows logically and inevitably from this Court's interstate water rights decisions. There is no authority to the contrary.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, Attorney General, ex rel, THE STATE OF MISSISSIPPI, Acting for itself and Parens Patriae for and on behalf of the People of the State of Mississippi,

Plaintiff,

Vs. Case No. CIVIL ACTION 2:05CV32D-B (And Related Cases)

THE CITY OF MEMPHIS, TENNESSEE and MEMPHIS LIGHT, GAS & WATER DIVISION,

Defendants.

THE DEPOSITION OF DAVID A. WILEY

VOLUME I

November 15th, 2007

BRIAN F. DOMINSKI, RPR, RMR
ALPHA REPORTING CORP.

COURT REPORTERS
LOBBY LEVEL, 100 NORTH MAIN BUILDING
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* * *

[p.28] * * *

Q. And there is no question but the water was flowing before there was any pumping?

A. Groundwater moves.

[p.29] * * *

Q. (BY MR. DAVID BEARMAN) You just said that groundwater moves.

A. Yes.

Q. Is that correct?

A. Yes.

Q. And groundwater was moving before there was any pumping?

A. Yes.

* * *

[p.30] * * *

Q. There was water flowing through Mississippi before there was any pumping in the Memphis Sands Aquifer, right?

A. Yes.

Q. And some of that water flowed through Mississippi and out of Mississippi before there was any pumping, right?

A. Yes.

* * *

A. * * * there is a groundwater flow system that has a groundwater budget in a given area. For this I'll say DeSoto County, that geographical area. This groundwater system has a groundwater budget where under natural conditions water flows into the given area. There is an amount of water that is -- a volume, a volume that is constant in the groundwater system, and there is an amount that flows out of that given area.

[p.31] * * *

A. The volume -- there is a volume that is always there. It has always got some coming in and some going out, but there is a constant volume that is always there * * *

* * *

[p.46] * * *

Q. You said groundwater moves?

A. Groundwater moves.

Q. All right. I asked you that groundwater was moving through DeSoto County before there was any pumping. Do you agree with that?

A. Yes.

Q. Okay. And some of that groundwater then was moving out of DeSoto County. Isn't that right?

A. Yes.

Q. Okay. And it was -- that means that it was leaving DeSoto County at some point, correct?

A. There is a -- there was some leaving, yes.

[p.47] * * *

Q. When it left DeSoto County, where did it go?

A. Groundwater under predevelopment conditions --

Q. Predevelopment conditions.

A. -- generally flows from east to west. There is a slight north component to that. * * *

* * *

[p.89] * * *

Q. All right. That was water that was naturally going from Mississippi into Shelby County?

A. That was water under predevelopment going from DeSoto County into Shelby County.

* * *

[p.90] * * *

Q. Well, as we sit here today, do you recall any change in storage?

A. Very little. As I sit here today, it was a small number.

Q. When you say "small number," is it --

A. Less than one. I mean, it was point something or another. .02. I'd have to look at the budget files.

Q. Is that insignificant in the scheme of things that we're talking about here?

A. Yes. When you are talking about thirty-five million, point zero something is not going to affect it very much.

* * *

[p.99] * * *

A. I meant to say -- I forgot we were talking predevelopment.

Q. So it just flowed because of gravity?

A. Yes.

Q. Okay. Either way, it is moving from the DeSoto County water budget to the Shelby County water budget?

A. Yes.

* * *

[p.123] * * *

A. * * * predevelopment in the Memphis Sands flows -- an amount flows from somewhere in DeSoto [p.124] County to Shelby.

* * *

APPENDIX 2

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, ATTORNEY GENERAL, EX REL., THE STATE OF MISSISSIPPI, ACTING FOR ITSELF AND PARENS PATRIAE FOR AND ON BEHALF OF THE PEOPLE OF THE STATE OF MISSISSIPPI,

PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV32-D-B
CONSOLIDATED

THE CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION,

DEFENDANTS

DESOTO COUNTY, MISSISSIPPI

PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV085-D-B

THE CITY MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION,

DEFENDANTS

NESBIT WATER ASSOCIATION, INC.; MISSISSIPPI UTILITY COMPANY, INC.; AND BILL J. ROBERSON, ON BEHALF OF THEMSELVES AND ALL OTHER ENTITIES AND PERSONS SIMILARLY SITUATED
PLAINTIFFS

VS. CIVIL ACTION NO. 2:05CV108-D-B

THE CITY MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION
DEFENDANTS

VIDEOTAPE DEPOSITION OF MDEQ 30(b)(6)
JAMIE CRAWFORD

Taken at Mississippi Department of Environmental Quality, 2380 Highway 80 West, Jackson, Mississippi, on Monday, July 30, 2007, beginning at 9:20 a.m.

* * *

[p.11] * * *

Q. And, Mr. Crawford, where do you presently work?

A. I work for the Department of Environmental Quality in the Office of Land and Water Resources.

Q. And is that what we often call MDEQ?

A. Yes.

Q. And that stands for Mississippi Department of Environmental Quality?

A. Correct.

* * *

[p.12] * * *

Q. What is your current position?

A. I'm the Assistant Director of the office.

Q. And how long have you had that position?

A. For three years.

Q. What are your general responsibilities and duties?

A. I am in charge of all permitting. I am in charge of many of the -- well, in keeping up with the water levels that are taken, the water use program, the source water assessment protection program. And those would probably be my main duties.

* * *

[p.34] Q. MDEQ is responsible for implementing the statutes and regulations of the State of Mississippi that have to do with groundwater, is that correct?

A. Correct.

Q. Are you familiar with the term "water use warning area"?

A. Yes.

Q. I'm going to hand you a document, if you could take a look at this for me.

A. (Witness complying.)

Q. Do you recognize that document? Do you recognize what I've just handed you?

A. Yes. It's part of our water statute.

Q. All right. And this is actually Mississippi statute Section 51-3-11; is that correct?

A. Correct.

Q. And have you seen this before?

A. Yes.

Q. Now, according to this statute, it says "the commission." Who is the commission?

A. The commission is a board that's appointed by the governor that acts as really our regulatory body.

[p.35] Q. Is that MDEQ?

A. Yes.

Q. It says: "The commission shall issue a water use warning or declare and delineate a water use caution

area if one of the following conditions exists. Number 1, the mining of an aquifer is occurring, or, 2, existing water resources, including surface water, groundwater, or both, are inadequate to meet present or reasonably foreseeable needs."

Did I read that correctly?

A. Yes.

Q. I'll hand you a second document. And do you recognize this as Mississippi law 51-3-3?

A. Yes.

Q. And if you'll turn to page 14, under definition M, it says: "Mining of an aquifer"; do you see that?

A. Yes.

Q. It says: "Mining of an aquifer means the withdrawal of groundwater from hydrologically connected" -- sorry -- "hydrologically connected water wearing formations in a manner in excess of the standards established by the commission."

[p.36] Did I read that correctly?

A. Yes.

Q. And the commission is MDEQ.

A. Yes.

Q. Now, MDEQ has never issued a water use warning; is that correct?

A. That's correct.

Q. And it has never declared or delineated a water use caution area; is that correct?

A. That's correct.

* * *

[p.40] * * *

Q. And you are here as the 30(b)(6) representative of MDEQ and the Office of Land and Water Resources to discuss permits.

A. Yes.

* * *

[p.89] * * *

Q. And, in fact, the water in the Sparta aquifer and the Memphis Sands aquifer and in the Lower Wilcox, Fort Pillow aquifers are flowing, correct?

A. Correct.

Q. They're -- this is not like a bathtub where the water's just sitting there.

A. Correct.

Q. It's moving more like a slow river, if you will.

A. Yes.

* * *

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, ATTORNEY GENERAL, EX REL., THE STATE OF MISSISSIPPI, ACTING FOR ITSELF AND PARENS PATRIAE FOR AND ON BEHALF OF THE PEOPLE OF THE STATE OF MISSISSIPPI,

PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV32-D-B
CONSOLIDATED

THE CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION,

DEFENDANTS

DESOTO COUNTY, MISSISSIPPI

PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV085-D-B

THE CITY MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION

DEFENDANTS

NESBIT WATER ASSOCIATION, INC.; MISSISSIPPI UTILITY COMPANY, INC.; AND BILL J. ROBERSON, ON BEHALF OF THEMSELVES AND ALL OTHER ENTITIES AND PERSONS SIMILARLY SITUATED)
PLAINTIFFS)
)
VS. CIVIL ACTION NO. 2:05cv108-D-B)
)
THE CITY MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT, GAS & WATER DIVISION)
DEFENDANTS)

VIDEOTAPE DEPOSITION OF MDEQ 30(B)(6)
JIM HOFFMAN

Taken at Mississippi Department of Environmental Quality, 2380 Highway 80 West, Jackson, Mississippi, on Monday, July 30, 2007, beginning at 3:00 p.m.

* * *

[p.7] * * *

Q. Okay. Can you tell me what your current position is?

A. I'm a geologist administrator with the Office of Land and Water Resources, which is [p.8] within the Department of Environmental Quality.

Q. What are your job duties?

A. I supervise several geologists and an engineer. We do investigations of groundwater resources in the state.

* * *

Q. And is your primary area groundwater?

A. Yes, it is.

* * *

[p.24] * * *

Q. All right. Now, the water in the Memphis Sands aquifer, the groundwater, is flowing, correct?

A. Yes, sir.

Q. This is not a bathtub we're talking about where the water is just stuck in one place.

A. No, sir.

Q. And the water comes in at the recharge area on, for example, the eastern side of DeSoto County, correct?

[p.25] A. Yes, sir.

Q. And then moves through DeSoto County.

A. Yes, sir.

Q. Now, before there was any pumping in the Memphis Sands or Sparta aquifer, that water was moving through DeSoto County, correct?

A. Yes, sir.

Q. The water wasn't going to stay in DeSoto County.

A. Ultimately, no, sir.

* * *

APPENDIX 4

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, Attorney General, ex rel., THE STATE OF MISSISSIPPI
PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV32-D-B
CONSOLIDATED FOR DISCOVERY

THE CITY OF MEMPHIS, TENNESSEE, and MEMPHIS LIGHT, GAS & WATER DIVISION,
DEFENDANTS

DESOTO COUNTY, MISSISSIPPI
PLAINTIFF

VS. CIVIL ACTION NO. 2:05CV085-D-B

THE CITY OF MEMPHIS, TENNESSEE, and MEMPHIS LIGHT, GAS & WATER DIVISION
DEFENDANTS

NESBIT WATER ASSOCIATION, INC., et al.
PLAINTIFFS

VS. CIVIL ACTION NO. 2:05cv108-D-B)
)
THE CITY OF MEMPHIS, TENNESSEE,)
and MEMPHIS LIGHT, GAS & WATER)
DIVISION)
DEFENDANTS)
)

THE VIDEOTAPED DEPOSITION OF
CHARLES THOMAS BRANCH

Taken on behalf of the Defendants on October 1, 2007, at the Barrett Law Office, 404 Court Square North, Lexington, Mississippi 39095, beginning at approximately 9:36 a.m.

Reported By: Marilyn C. Rea, CSR 1059, RPR 036208

* * *

[p.13] * * *

Q So you were head of the Office of Land and Water Resources from 79 until 2002?

A That is correct, sir.

* * *

[p.18] * * *

Q * * * The water in the Memphis Sands and Sparta aquifer is moving through the sand particles, correct?

A Correct.

Q It's not like a bathtub and static, right?

A Correct.

* * *

APPENDIX 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JIM HOOD, Attorney General,
ex rel., THE STATE OF MISSISSIPPI,
Acting for Itself and Parens
Patriae for and on Behalf of the
People of the State of Mississippi
PLAINTIFF

VS. NO. 2:05CV32

THE CITY OF MEMPHIS, TENNESSEE, AND
MEMPHIS LIGHT, GAS & WATER DIVISION
DEFENDANTS

ORAL ARGUMENT REGARDING JURISDICTION
BEFORE HONORABLE GLEN H. DAVIDSON

Federal Building, Oxford, Mississippi
February 4, 2008

* * *

[p.8] * * *

[Mr. Cameron:] * * * At this juncture, Mississippi has streamlined this case.

As you know from our submission on Friday, Your Honor, we have elected not to pursue the injunctive relief. We've also, as evidenced by our pretrial order and findings of fact and conclusions of law, eliminated some other claims, and this is simply an action for damages by Mississippi against these defendants for the trespass and conversion and unjust enrichment resulting from taking of water from DeSoto County only, no other geographical area, and certainly not from Tennessee or Arkansas or -- and it does not involve any conduct that would implicate the core interest of those states.

* * *

APPENDIX 6

No. 08-60152

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JIM HOOD, Attorney General, ex rel., THE STATE OF MISSISSIPPI, Acting for Itself and *Parens Patriae* for and on behalf of the People of the State of Mississippi, Plaintiff-Appellant	)
v.	)
THE CITY OF MEMPHIS, TENNESSEE, and MEMPHIS LIGHT, GAS & WATER DIVISION, Defendants-Appellees	)

On Appeal from the United States District Court
for the Northern District of Mississippi,
Delta Division (2:05CV32-D-B)

***AMICUS CURIAE* BRIEF OF THE STATE OF TENNESSEE IN SUPPORT OF THE CITY OF MEMPHIS, TENNESSEE, AND MEMPHIS LIGHT GAS AND WATER DIVISION AND REQUESTING AFFIRMANCE OF THE DISTRICT COURT**

* * *

The State of Tennessee submits this brief as *amicus curiae* in support of appellees, the City of Memphis and Memphis Light, Gas and Water, and in accordance with Fed. R. App. P. 29 and 5th Cir. R. 29. * * * An equitable apportionment would implicate the sovereign interest of Tennessee in the aquifer ground water within its borders. This interest arises from Tennessee's power as sovereign to regulate this natural resource for the benefit of its citizens. * * *

Because of its sovereign interest in the aquifer ground water, Tennessee would be a necessary and indispensable party to an equitable apportionment action. * * *

* * *

As noted, the Memphis Sands aquifer is an interstate water body underlying Tennessee and Mississippi, as well as other states in the region. Tennessee certainly has an interest as sovereign in the ground water within its borders. * * *

* * *

An action to equitably apportion the ground water in the Memphis Sands aquifer would implicate the sovereign interests of Tennessee. * * *

* * *